SUPREME COURT, U. S.

MAY 24 1968

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No. 1188

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

PAUL E. SULLIVAN, ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

T. R. FREEMAN, JR., ET AL., *Petitioners*

v.

LITTLE HUNTING PARK, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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The Court having specially requested Little Hunting Park, Inc. to submit a response to the petition for a writ of certiorari, petitioners respectfully request leave of the Court to file this reply to respondents' brief in opposition.

1. Respondents assert (Op. pp. 3, 4) that no prior notice was given to their counsel, Mr. Harris, before the transcripts were tendered to the trial judge, and upon this premise, attempt to distinguish the authorities cited by petitioners. This assertion, however, does not accord with the facts. As shown in the affidavit of Mr. Brown (*infra*, pp. 6, 9), he notified Mr. Harris by telephone on the morning of June 9, 1967, that he was submitting the reporter's transcripts to

the trial judge that afternoon. Mr. Brown further informed Mr. Harris that because of transcript errors, he was filing motions for correction of the record, noticing them for hearing on Friday, June 16, 1967, the court's next Motion Day. Finally, he told counsel that he would request the trial judge to defer signing the transcripts for the maximum period permitted under Rule 5:1, Sec. 3(f) (Pet. pp. E-1 - E-2) to allow for action on the motion.

In his letter to Mr. Harris of June 9, 1967 (*infra*, p. 10), Mr. Brown confirmed their earlier telephone conversation of that day, and reiterated that he would request the judge not to sign the transcripts until they had been corrected pursuant to the motions for corrections of the record. Although the transcripts were left with the judge's secretary on June 9, the judge ruled (as indicated by his notation at the end of the transcripts) that the tender was not perfected until he returned to his office three days later, on June 12. On June 12, Mr. Harris wrote Mr. Brown (*infra*, p. 11) in reference to their telephone conversation of the preceding Friday, and noted that because he did not have copies of the transcripts he could not consent to the requested corrections without reviewing the testimony. Significantly, Mr. Harris did not assert in his letter that he had not received prior notice of the tender of the transcripts to the judge, as indeed he could not, for obviously he had received notice.

2. The decisions of the Virginia Supreme Court of Appeals make clear that where opposing counsel has *actual* notice of the tender of the transcript to the trial judge and has sufficient opportunity to examine the record for accuracy before it is authenticated by the trial judge, the requirement of prior written notice is deemed waived, "particularly where its purpose has been otherwise accomplished." *Kornegay v. City of Richmond*, 185 Va. 1013, 41 S.E.2d 45, 49; *Grimes v. Crouch*, 175 Va. 126, 7 S.E.2d 115, 116-117; *Taylor v. Wood*, 201 Va. 615, 112 S.E.2d 907, 910. Not only did Mr. Harris' letter of June 9, in which he failed to raise any issue concerning the manner of notice under Rule

5:1; Sec. 3(f), constitute a waiver of the requirement of written notice, but as we have shown in the petition (p. 23), the rule was satisfied in any event when Mr. Harris was provided full opportunity to examine the transcript and make any objections, before it was signed by the judge. *Bacigalupo v. Fleming*, 199 Va. 827, 102 S.E.2d 321, 326.[1] And see *Town of Falls Church v. Myers*, 187 Va. 110, 46 S.E.2d 31, 34; *Cook v. Virginia Holsum Bakeries, Inc.*, 207 Va. 815, 153 S.E.2d 209, 210; *Hyson v. Dodge*, 198 Va. 792, 96 S.E.2d 792, 798-799. Accordingly, it is apparent that the "appellees were not in any way prejudiced by the fact that an earlier notice was not given." *Stokely v. Owens*, 189 Va. 248, 52 S.E.2d 164, 167.[2]

3. In asserting that the Virginia Supreme Court of Appeals' disposition of this case was consistent with prior decisions of that court, respondents rely upon *Snead v. Commonwealth*, 200 Va. 850, 108 S.E.2d 399 (alternative holding). The facts present here, however, differ fundamentally from those in *Snead*, for in that case counsel gave notice at the residence of opposing counsel, after office hours, 30 minutes before tendering a narrative statement of the evidence to the trial judge. The narrative, characterized as "confusing", omitted the entire testimony of a very material witness which the trial judge, on his own initiative, was required to incorporate. Rejecting the contention that opposing counsel's opportunity to examine the narrative after tender was

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[1] As explained in *Bacigalupo*, under the present rule "the requirement of 'reasonable notice' of tendering [appearing in both the present and former rules] is [now] modified and qualified by the provision affording opposing counsel a reasonable opportunity to examine the original or a true copy of [the transcript].'"

[2] Since the decree of the trial court in the *Freeman* case was not entered until May 8, 1967, the 70-day period under Rule 5:1, Sec. 3(f) within which the trial judge was required to sign that transcript did not expire until July 17, 1967. Thus, Mr. Harris had over a month to examine the *Freeman* transcript after tender, had he concluded that further time was necessary.

sufficient compliance with the rule, the Court of Appeals observed that under the rule the duty to afford a reasonable opportunity to examine the transcript or narrative rests on counsel and not the trial judge. 108 S.E.2d at 402.

In contrast, here opposing counsel not only had three days' advance notice of tender of the transcripts, but was informed by petitioners' counsel that he would request the trial judge to defer the signing for the maximum period permitted by the rules to enable counsel to examine the proposed corrections to the transcripts and to suggest changes. Thus, in accordance with the rule, petitioners' counsel assumed full responsibility for assuring that opposing counsel had reasonable opportunity to examine the transcripts. In these circumstances, we submit, the Supreme Court of Appeals' ruling that Rule 5:1, Sec. 3(f) was not satisfied, in view of its consistent line of decisions to the contrary, is inexplicable.[3] As this Court stated in *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 457-458, such [n]ovelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." To conclude that the state court's

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[3] See *Cook v. Virginia Holsum Bakeries, Inc., supra.* (Although notice of tender was given October 15 of tender on October 20, copy of proposed narrative was not supplied until October 19. Since opposing counsel was able to examine statement and make corrections, notice was held sufficient; *Bacigalupo, supra*, cited, and *Snead, supra*, held distinguishable.)

interpretation of its rule here is a non-federal ground adequate to support the judgment would "force resort to an arid ritual of meaningless form." *Staub v. Baxley*, 355 U.S. 313, 320.

Respectfully submitted,

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Of Counsel

May 1968.

APPENDIX

VIRGINIA—

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

PAUL E. SULLIVAN, et al., Plaintiffs,	)	
v.	)	In Chancery No. 22751
LITTLE HUNTING PARK, INC., et al., Defendants.	)	

AFFIDAVIT

I, Allison W. Brown, Jr., attorney for the plaintiffs in the above matter, being duly sworn, do state:

That on Friday morning, June 9, 1967, I called John Charles Harris, Esquire, attorney for the defendants, on the telephone and informed him that I was submitting the reporter's transcript in this case to Judge James Keith that afternoon. I further informed Mr. Harris that the transcript contained numerous errors, and therefore that the attorneys for the plaintiffs were filing a Motion for Correction of the Record, noticing it for hearing on the Court's next motion day, which would be Friday, June 16, 1967. I also stated to Mr. Harris that I would notify Judge Keith that plaintiffs' attorneys were filing such a motion and that I would request that Judge Keith defer signing the transcript until the end of the period permitted by the Court's Rules, in order to allow time for action on the motion.

That after talking to Mr. Harris, I wrote him a letter which I deposited postage prepaid in a mail box in Alexandria, Virginia on Friday afternoon, June 9, 1967. In said letter to Mr. Harris, I confirmed our telephone conversation, stating that I was submitting the reporter's transcript to Judge Keith that day, and indicating again that plaintiffs were fil-

ing a Motion for Correction of the Record, and further, that I would request Judge Keith to defer signing the transcript to allow time for Mr. Harris to consent to the motion or so that it could be otherwise acted upon by the Court.

That at approximately 3:45 P.M. on June 9, 1967, I took the reporter's transcript in this case, as well as a copy of my aforesaid letter to Mr. Harris, to Judge Keith's office in the Fairfax County Court House. I was informed by the Judge's secretary that Judge Keith was conducting a trial in Alexandria and that she did not expect him back in the office that afternoon. I then gave the aforesaid transcript and letter to the secretary, who took them into Judge Keith's office and I observed her place them on the Judge's desk.

That on Sunday, June 11, 1967, Robert M. Alexander, one of the attorneys for the plaintiffs, served on John Charles Harris, Esquire, a copy of the plaintiffs' Motion for Correction of the Record, by depositing it postage prepaid in the United States Mail. With said motion was served a notice that it would be brought to hearing before the Court on Friday, June 16, 1967. Said notice and motion were also mailed on June 11, 1967, to the Clerk of the Court, with a copy of each to Judge Keith.

That the aforesaid motion was placed on the Court's calendar for Friday, June 16, 1967 and was heard that day by Judge Keith.

That Judge Keith stated in open court on June 16, 1967, that the reporter's transcript in this case had been available for examination in his office ever since it had been left there a week earlier, but since it appeared that Mr. Harris had not availed himself of the opportunity to examine it, Judge Keith stated that he would not act on the Motion for Correction of the Record until Mr. Harris indicated his agreement or disagreement with the changes requested.

That I consented in open court that, in order to facilitate Mr. Harris' examination of the reporter's transcript, I would make available to him on a loan basis the plaintiffs' duplicate copy of said transcript.

That I gave said copy of the transcript to Mr. Harris at 1:20 P.M. on Friday, June 16, 1967, and he retained it until 6:30 P.M., Monday June 19, 1967, at which time he returned it to me.

That at the time Mr. Harris returned the plaintiffs' copy of the transcript, he informed me that he had no objections to any of the corrections of the record requested by the plaintiffs, and that he had no further corrections to request on behalf of the defendants. Mr. Harris stated that he therefore had no objection to entry of an order correcting the record to the respects specified in the motion. Mr. Harris thereupon signed a proposed order which had been prepared by me for submission to Judge Keith granting the plaintiffs' Motion for Correction of the Record.

That the proposed order granting the Motion for Correction of the Record was submitted by the plaintiffs to Judge Keith on Tuesday afternoon, June 20, 1967.

Allison W. Brown, Jr.

[Jurat.]

[Certificate of Service dated the 6th day of July, 1967.]

AFFIDAVIT

[Caption omitted]

I, Allison W. Brown, Jr., attorney for the plaintiffs in the above matter, wishing to supplement and add to my affidavit previously given herein, and being duly sworn, do state:

That on Monday, June 12, 1967, at approximately 9:30 A.M. I called Judge James Keith on the telephone at his office, and he acknowledged having received the reporter's transcript, the copy of my letter to Mr. Harris dated June 9, 1967, and a copy of the plaintiffs' Motion for Correction of the Record. I asked Judge Keith at that time to defer signing the transcript until the Motion for Correction of the Record had been acted upon, and he indicated that he would do so.

Allison W. Brown, Jr.

[Jurat.]

[Certificate of Service dated the 8th day of July, 1967.]

Suite 501, 1424 - 16th Street, N. W.
Washington, D. C. 20036
June 9, 1967

John Charles Harris, Esquire
1500 Belleview Boulevard
Alexandria, Virginia

Re: *Sullivan v. Little Hunting Park, Inc.* In Chancery No. 22751
Freeman v. Little Hunting Park, Inc. In Chancery No. 22752

Dear Mr. Harris:

This will confirm our telephone conversation of today in which I notified you that plaintiffs are submitting the reporter's transcripts in the above cases to Judge Keith today.

As I indicated, the transcripts contain innumerable errors, and it has been a major task to draft necessary corrections to make them intelligible. We will serve you on or about June 12 with motions to correct the two transcripts, and will ask Judge Keith to defer signing the transcripts until the end of the 10-day period permitted by the Rules. This will allow time for you to consent to the motions or to have them otherwise acted upon by the Court.

Very truly yours,

Allison W. Brown, Jr.
Attorney at Law

cc: Judge James Keith
Circuit Court of Fairfax County
Fairfax, Virginia

LAW OFFICES
HARRIS AND ROARK
1500 BELLE VIEW BOULEVARD
ALEXANDRIA, VIRGINIA

June 12, 1967

Allison W. Brown, Jr., Esquire
1424-16th Street, N.W., Ste. 501
Washington, D.C.

Re: Sullivan v. Little Hunting Park, Chancery No. 22751
Freeman v. Little Hunting Park, Chancery No. 22752

Dear Mr. Brown,

I have received your motion for the correction of the record in the above cases. It appears that your motions request 220 corrections in the record of the Sullivan case and 43 corrections in the Freeman case.

As I informed you on the telephone on Friday, June 9, 1967, I do not have a copy of the transcript and therefore, cannot consent to these changes without adequate review of the testimony.

Sincerely,

/s/ J. Harris
John Chas. Harris

JCH:caw

cc: Judge James Keith
Circuit Court of Fairfax County